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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANIEL EMANUEL MARTINEZ, Defendant and Appellant.	E065042 (Super.Ct.No. FSB1300044) OPINION

APPEAL from the Superior Court of San Bernardino County. R. Glenn Yabuno, Judge. Affirmed.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

Following a conviction for first degree murder and attempted premeditated murder (Pen. Code, §§ 187, subd. (a), 664),[1] Daniel Emanuel Martinez received a sentence of 22 years 4 months plus 50 years to life in prison.[2] Martinez raises one claim on appeal, that the trial court erred in denying his *Batson/Wheeler*[3] motion after the prosecutor peremptorily excused three Hispanic prospective jurors. The trial court denied the motion, concluding Martinez had failed to make a prima facie showing of discrimination. We agree and affirm.

I

FACTUAL BACKGROUND

A. *Trial Evidence*

Early in the morning on January 1, 2013 in San Bernardino, Mark Daniel Mancha and Vincente Lavin walked past Martinez's house while Martinez was in his front yard. After asking the two men where they were from (a question Lavin understood to be gang related), Martinez shot Mancha in the head, killing him. Martinez fired at and missed Lavin as Lavin ran away. The only relevant aspect of Martinez's crimes to this appeal is both he and his victims are Hispanic.

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[1] Unlabeled statutory citations refer to the Penal Code.

[2] Martinez's conviction includes several firearm enhancements. As to the murder, the jury found he had personally and intentionally discharged a handgun causing great bodily injury and death. (§ 12022.53, sub. (d).) As to both offenses, the jury found he had personally and intentionally discharged a firearm (§ 12022.53, sub. (c)) and had personally used a firearm (§ 12022.5).

[3] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

B. *Jury Selection*

1. The *Batson/Wheeler* motion

During voir dire, the prosecutor exercised a total of five peremptory challenges. She used her first, second, and fifth to excuse three prospective jurors—No. 24, No. 45, and No. 25—all of whom were Hispanic men. After the excusal of No. 25, defense counsel made a *Batson/Wheeler* motion, arguing the prosecutor was "attempt[ing] to deplete the jury pool of potential Hispanic Americans" by using three of five peremptory challenges to excuse Hispanic men. Counsel did not provide any additional facts or reasoning to support his argument. Without asking the prosecutor for comment, the court found defense counsel had failed to make a prima facie showing of discrimination and denied the motion. It noted that No. 45 appeared to have difficulties comprehending the proceedings and understanding the jury questionnaire. It also noted that No. 25 had given equivocal answers. It made no comment regarding No. 24.

The parties accepted the jury pool after the court's ruling. The defense had exercised a total of three peremptory challenges, the prosecution five. Aside from the fact the court and parties seemed to agree No. 24, No. 45, and No. 25 were of Hispanic descent, the record does not disclose any other information about any of the other jurors' or prospective jurors' ethnic backgrounds.

2. *The challenged prospective jurors*

No. 45 said he is a dentist. He said he no longer works, but used to work at "the casino." He has six children. He said they were all unemployed, but also said they work

for the casino. He said his sons had served two years in jail in San Bernardino County for "beat[ing] up their girlfriend or something," but he had not been involved in the proceedings and believed they had been treated fairly. He had no close friends or relatives in law enforcement, no one close to him had been a victim of a crime, and he had never met a person who was accused of being a gang member. He believed he could be fair.

When the prosecutor asked the jury pool about viewing graphic evidence, No. 45 shook his head and said, "Yeah, I wouldn't like to see that." The prosecutor asked, "So you don't want to have nothing to do with this?" and he replied, "No."

The following exchange occurred when the prosecutor asked the prospective jurors if there were any reasons they should not serve on a jury:

"[NO. 45]: I don't believe I can make it through jury trial like this because there's a lot of people that I know and for murder and all of this stuff, and I can't be in here saying, there you go, and that's it—oh, my gosh.

"[PROSECUTOR]: Do you know a lot of people that have been murdered, is that what you're saying?

"[NO. 45]: Yeah, murder and been in jail and drugs.

"[PROSECUTOR]: So you know people—

"[NO. 45]: I don't want to be like a witness, and I don't know what you call it.

"[PROSECUTOR]: You don't want to be involved in a case where someone may potentially go to prison, is that what you're saying?

"[NO. 45]: No. Like, if you have somebody here on jury trial and I know that person, I can't say put 'em in jail or let them go, whatever.

"[PROSECUTOR]: Well, we asked, the judge asked you, if you knew anyone that was on the list.

"[NO. 45]: Yeah.

"[PROSECUTOR]: Do you know anyone that was called out on the witness list?

"[NO. 45]: I just—the first one, I guess, was one of my sons, that's all.

"[PROSECUTOR]: You know your sons. Well, okay. I apologize, but I'm a little confused?

"[NO. 45]: I apologize too, the way I said it.

"[PROSECUTOR]: So let me just ask you this basic question: Why is it that you don't think that you could be a fair juror?

"[NO. 45]: I don't know, because I don't understand all this other stuff and I'm too slow to understand it, you know.

"[PROSECUTOR]: So are you having a hard time understanding what we're talking about?

"[NO. 45]: Yeah.

"[PROSECUTOR]: Okay. So you think because of that you wouldn't be able to be a fair juror?

"[NO. 45]: Yeah.

"[PROSECUTOR]: Okay. Thank you for that. I appreciate your honesty."

At that point, the prosecutor requested a challenge for cause, and defense counsel opposed it. The court denied the challenge, noting however "that [No. 45] may have some comprehension issues."

No. 24 was retired from working in the railroad. He was married and had three adult daughters. One was married to a San Bernardino police detective, one used to date a sheriff, and the third used to date a police officer. His nephew had been charged with a crime and he had discussed the case with his nephew, but he believed he could be fair in this case. Like No. 45, No. 24 also expressed discomfort about viewing graphic evidence. He said, "I think I would have trouble looking at, you know, a dead person." He told the prosecutor, "I would probably look at [the graphic evidence] once." The prosecutor followed up with, "Once. Okay. And then that's it?" and he said, "That's it, yeah."

No. 25 worked for a pharmaceutical warehouse and his spouse worked for an animal hospital. His cousin worked for the San Bernardino Police Department. He had never served on a jury and believed he could be fair. When the court asked if anyone had received a ticket from law enforcement they believed was undeserved, No. 25 raised his hand. The following exchange occurred:

"THE COURT: And you don't think you should have gotten that ticket?

"[NO. 25]: No.

"[¶] . . . [¶]

"THE COURT: Are you willing to set aside that particular instance and not equate your feelings about that officer with every law enforcement officer who testifies?

"[NO. 25]: No.

"THE COURT: Okay. So you can do that?

"[NO. 25]: Yeah."

As the court later explained when it ruled on Martinez's *Batson/Wheeler* motion, it viewed No. 25's answers on the subject of law enforcement bias "equivocal."

II

DISCUSSION

Martinez contends the court erred in concluding he had not made a prima facie case of discrimination and in not asking the prosecutor for her reasons for excusing No. 24, No. 25, No. 45. He argues remand is necessary to allow the court to continue the three-step *Batson/Wheeler* inquiry and reverse his conviction if it finds discrimination. As we explain, we agree with the trial court that Martinez failed to establish a prima facie case of discrimination, and therefore "no remedial step of any kind is warranted." (*People v. Garcia* (2011) 52 Cal.4th 706, 746 (*Garcia*).)

The use of peremptory challenges to exclude prospective jurors based on race or ethnicity is unconstitutional. (*Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; *Batson*, *supra*, 476 U.S. at p. 97.) It violates a criminal defendant's Fourteenth Amendment right to equal protection, as well as the right to trial by a jury drawn from a representative cross-

section of the community under the California Constitution. (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1157.)

"There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination." (*People v. Bonilla* (2007) 41 Cal.4th 313, 341 (*Bonilla*).) "The now familiar *Batson/ Wheeler* inquiry consists of three distinct steps. First, the opponent of the strike must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose in the exercise of peremptory challenges. Second, if the prima facie case has been made, the burden shifts to the proponent of the strike to explain adequately the basis for excusing the juror by offering permissible, nondiscriminatory justifications. Third, if the party has offered a nondiscriminatory reason, the trial court must decide whether the opponent of the strike has proved the ultimate question of purposeful discrimination." (*People v. Scott* (2015) 61 Cal.4th 363, 383, citing *Johnson v. California* (2005) 545 U.S. 162, 168 (*Johnson*).)

"'When a trial court denies a *Wheeler* motion without finding a prima facie case of group bias, the appellate court reviews the record of voir dire for evidence to support the trial court's ruling.'" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1101 (*Guerra*), overruled on another point in *People v. Rundle* (2008) 43 Cal.4th 76.) Where, as here, it is unclear whether the trial court applied the correct "reasonable inference" standard or the former "strong likelihood" standard overruled in *Johnson*, "we independently decide whether the record permits an inference that the prosecutor excused jurors on prohibited

discriminatory grounds."[4] (*Garcia*, *supra*, 52 Cal.4th at p. 747.) "'We will affirm the ruling where the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question.'" (*Guerra*, *supra*, at p. 1101.)

The court's analysis in *Bonilla* is instructive here. In that case, the defendant raised a *Batson/Wheeler* claim based on discrimination against African-American prospective jurors. The only evidence he presented in support of his prima facie case of discrimination was the fact the prosecution excused the only two African-American prospective jurors in a 78-person juror pool. (*Bonilla*, *supra*, 41 Cal.4th at p. 342.) Our high court agreed with the trial court that this evidence was insufficient to trigger step two of the *Batson/Wheeler* inquiry, explaining, the small size of the sample—"two of two"— made drawing an inference of discrimination from the sample size alone "impossible." (*Bonilla*, at pp. 342-343.) The court also noted the defendant had not argued the prosecution's questioning of the two African-American prospective jurors "was cursory or materially different from the questioning of non-African-American [prospective] jurors." (*Id.* at p. 343.)

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[4] In *Johnson*, the United States Supreme Court reversed *People v. Johnson* (2003) 30 Cal.4th 1302, in which the California Supreme Court confirmed that the relevant California standard—even if it sometimes had been expressed as a "'reasonable inference'"—was to show that it was "more likely than not" that purposeful discrimination had occurred. (*Id*. at p. 1306.) "The high court disapproved this exacting standard for federal constitutional purposes, and said that a prima facie burden simply involves 'producing evidence sufficient to permit the trial judge to draw an inference' of discrimination." (*Garcia*, *supra*, 52 Cal.4th at pp. 746-747, citing *Johnson*, *supra*, 545 U.S. at p. 170.)

The court identified certain types of evidence that are "especially relevant" to a prima facie case of discrimination: "'[T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention.'" (*Bonilla, supra,* 41 Cal.4th at p. 342.) The defendant's failure to present any of these types of evidence coupled with the fact "the information elicited in voir dire showed race-neutral reasons for excusing both prospective jurors" formed the basis of the court's conclusion that the defendant's evidence was insufficient to give rise to an inference of discrimination. (*Id.* at p. 343)

Here, the evidence Martinez offered in support of his *Batson/Wheeler* claim was even weaker than the evidence in *Bonilla*. Like the defendant in *Bonilla,* Martinez did not contend the prosecutor's questioning of No. 24, No. 25, or No. 45 was cursory or materially different from the questioning of non-Hispanic prospective jurors. (*Bonilla,*

supra, 41 Cal.4th at p. 343.) Nor could he, as the record shows the prosecutor asked No. 24, No. 25, and No. 45 the same types of questions she asked the other prospective jurors and then spent time further questioning No. 24, No. 25, and No. 45 when their responses raised concerns. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [far from engaging the challenged prospective jurors "in more than desultory voir dire" or failing to ask them "any questions at all," "[h]ere the prosecutor tried to question them further, which [] suggests a nonracial motivation for their excusal"].)

Unlike the defendant in *Bonilla*, however, Martinez presented no evidence regarding the ethnic makeup of the jury pool or the percentage of Hispanic prospective jurors the prosecutor had excused. In *Bonilla*, the court knew the prosecution had excused 100 percent of the African-Americans in the pool. Here, in contrast, we cannot discern important statistical information like the percentage of the total number of Hispanic prospective jurors the prosecutor excused or whether the empaneled jury included any jurors of Hispanic descent. For example, we do not know whether No. 24, No. 25, and No. 45 were the only Hispanic prospective jurors in the jury pool. There may have been several other Hispanic prospective jurors, any number of which were selected for the empaneled jury. Without this kind of information, it is impossible for a trial court to infer a discriminatory purpose, especially in cases like this where both the defendant and the victims are members of the challenged cognizable group. (*Garcia*, *supra*, 52 Cal.4th at p. 747 ["we have found it '"'impossible,'"' as a practical matter, to draw the requisite inference where only a few members of a cognizable group have been

excused and no indelible pattern of discrimination appears"]; *People v. Cleveland*, *supra*, 32 Cal.4th at p. 733 [the fact a defendant and victim are part of the same protected group can cut against an inference of discrimination].)

As our high court has explained, *Batson/Wheeler* claims like Martinez's consisting of no more "than an assertion that a number of prospective jurors from a cognizable group had been excused" are "particularly weak." (*People v. Panah* (2005) 35 Cal.4th 395, 442.) "Such a bare claim falls far short of 'rais[ing] a reasonable inference that the opposing party has challenged the jurors because of their race or other group association.'" (*Ibid.*) A prima facie "demonstration entails, at the least, making as complete a record as feasible . . . [and d]efense counsel's cursory reference to prospective jurors by name, number, occupation and race was insufficient." (*People v. Yeoman* (2003) 31 Cal.4th 93, 115.) Martinez failed to supplement his claim with statistical evidence or evidence of a disparate questioning style on behalf of the prosecution. He presented nothing more than the challenged prospective jurors were Hispanic, and thus his showing was insufficient.

Finally, as was the case in *Bonilla*, the record reveals legitimate, race-neutral reasons for excusing No. 24, No. 25, and No. 45. Martinez argues there was nothing controversial about these prospective jurors that would prompt a peremptory challenge and points out they had all said they could be fair and one of them—No. 24—even had positive ties to law enforcement. However, Martinez overlooks the aspects of their responses that would reasonably raise prosecutorial concerns.

No. 25 said he had once received a ticket he did not think he deserved and then said he would be unable to put aside this negative interaction with law enforcement and hear evidence from police in this case without bias. No. 25 changed his answer when the court asked him a second time whether he could set aside the prior experience, this time saying he believed he could. The court found No. 25's responses equivocal, and we agree. A potential for bias against law enforcement is a legitimate, race-neutral reason for the prosecution to excuse a prospective juror.

As to No. 24 and No. 45, both said they would be uncomfortable viewing graphic evidence like autopsy photographs. This too is a legitimate, race-neutral reason for excusing a prospective juror, especially because this case involved a fatal gunshot wound to the victim's head. The prosecutor could have reasonably doubted whether No. 24 and No. 45 would have been willing or able to give all of the trial evidence due attention. We also note No. 45's responses during voir dire raise significant concerns about his ability to hear and comprehend the proceedings. Not only did he bluntly tell the prosecutor he could not understand the proceedings, he also gave several confusing and contradictory responses when answering the jury questionnaire. "[P]eremptory challenges are not challenges for cause" and thus may be made on an "'apparently trivial'" basis. (*People v. Jones* (1998) 17 Cal.4th 279, 294.) Our record review satisfies us that there were race-neutral, and even non-trivial, reasons for excusing these three prospective jurors.

Martinez contends the trial court erred by not asking the prosecutor for her reasons for excusing No. 24, No. 25, and No. 45. While it is a good practice for trial courts to

solicit the prosecutor's reasons at step one, the failure to do so is not error unless the defendant has established a prima facie case of discrimination. (*Garcia*, *supra*, 52 Cal.4th at p. 746 ["the prosecutor was not required to disclose reasons for the excusals, and the court was not required to evaluate them, until a prima facie case was made"].) Having concluded Martinez did not establish a prima facie case, we find no error in how the trial court handled his *Batson/Wheeler* claim.

III

DISPOSITION

We affirm the judgment.

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SLOUGH
J.

We concur:

MILLER
Acting P. J.

CODRINGTON
J.